IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 727 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

KARSAN MERAMAN AAHIR

Appearance:

Ms. Katha Gajjar, APP for Petitioner

MR YOGESH S LAKHANI for Respondent No. 1

NOTICE SERVED for Respondent No. 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 04/05/1999

ORAL JUDGEMENT

Whether against the order of the lower court, permitting or preventing the party to put a particular question to the party or a witness, Revision Application is maintainable, and whether the lower Court can be directed to allow or disallow the question is the moot question raised in this Revision Application.

2. The opponent No.1 is the father of the opponents Nos 2 & 3. Arjan Khima was the son-in-law of opponent No.1. As alleged, he was having illicit relation with

Hiriben, the wife of his elder brother. He wanted to marry Hiriben by way of "Diervata Vidhi" which made the opponent ireful. As they were enraged, they as alleged caused murder of Arjan Khima showering the pipe, cart-pag and genda blows. After the F.I.R. was lodged with Kalyanpur police station, investigation was taken on hand. A chargesheet of the offences punishable u/s. 324 & 302 r.w. Sec. 114, I.P. Code and Sec. 135, Bombay Police Act came to be filed in the Court of the Judicial Magistrate (F.C.) at Kalyanpur. The case was then committed to the Court of Sessions at Jamnagar. The same came to be registered as Sessions Case No. 53/96. It was assigned to the learned Addl. Sessions Judge, Jamnagar for hearing and disposal in accordance with law. The learned Addl. Sessions Judge, after framing charge & recording plea was recording the evidence being adduced by the prosecution. Over and above other witnesses, Dr. Mansukhbhai Shamlabhai Makwana who performed the post mortem is examined at Ex.11. When a question was put to him Dr. Makwana replied that external injury No.1 and internal injury No.2 which he while performing post mortem noticed were not sufficient in the ordinary course of nature to cause death, the same might possibly cause death. In the cross-examination, he stated that despite the said two injuries, there was the possibility of the victim being saved, and the head-injury he noticed was not likely to cause death. As this Doctor did not support the prosecution, it was thought it fit to examine Dr. Nilesh Kantilal Shingala because the deceased who was under treatment in Irvin Hospital was referred to Prabhat Hospital at Rajkot for C.T. Scanning, which was carried out and deceased was also treated by him. Dr. Shingala was being examined in the Court at Ex.42. A question was then put to him whether the injuries on the person of deceased were sufficient in the ordinary course of nature to cause death ? This question was objected to by the learned Advocate representing the opponents, on the grounds that Dr. Makwana's evidence was already recorded on the point and his opinion was already on record. In the statement before police, Dr. Shingala stated nothing in this regard. It was also not mentioned whether this doctor performed any operation. The objection was accepted by the learned Addl. Sessions Judge. The prosecution was thus prevented from putting the question. Remaining evidence of this doctor was then recorded and it was over on the same day. The petitioner State felt that serious injustice was caused as the question was disallowed. In the result, present application is filed calling in question the legality & validity of the order disallowing the question.

3. Ms. B.R. Gajjar, the learned A.P.P., assailing the order, submits that the learned Addl. Sessions Judge has made a grave mistake in disallowing the question as a result of which prejudice is caused to the prosecution. The objection raised was freakish, but when it carried through, the prosecution was pushed to the wall, every thing was found to be a new one on it, and it had to helplessly give the ground despite the fact that the objection raised had no ground to stand upon in law. It was open to the prosecution to ask the same question to another expert for necessary elucidation or support or for knowing the correct position albeit the fact that answer given may aggrandize the prosecution or worsen its case. For imparting full justice and to avoid any damage being caused to the prosecution the lower court ought to have allowed the question. Now the only way out to correct the error of the lower court is to interfere with the same in this Revision and direct the court below to permit the prosecution to put the question and record the answer given, and that would further the ends of justice. It is urged that if required inherent powers u/s. 482 Cr.P. Code may be exercised.

4. In reply, the learned advocate for the opponents submits that this application is not maintainable for the impugned order is the interlocutory order which attracts the provision of Sec. 397(2) Cr.P. Code. Even otherwise also, the order is quite in consonance with law. There is no reason to disturb it in Revision or under inherent powers.

5. Whether the order in question can be said to be the interlocutory is the question posed before me for consideration. The expression "interlocutory order" is not defined in Cr.P. Code. In order to judge whether the particular order is interlocutory or otherwise, the Court has to, making every endeavour, find out whether the order in question is interlocutory order. If it is found that the order passed is purely interim or temporary in nature which does not decide or touch the important rights and liabilities of the parties and give a final shape to a particular point at a particular stage during the course of the hearing, the same can be termed interlocutory order. If the order substantially affects the rights and liabilities of the parties it would not be the interlocutory order. It may also be stated that intermediate or quasi-final order which determines a particular issue finally at any stage of the hearing will not fall within the ambits of `interlocutory order'. The nature of the impugned order has to be examined in view of such meaning of interlocutory order.

6. Either rightly or wrongly,the Court permits or prevents the party to ask a particular question to the witness or the party deposing,it does not decide any of the issues that arise for consideration finally. In other words, the rights and obligations of the parties are not finally decided, or there is no end of a particular issue at that stage. The Court thereby undergoes the procedural aspect keeping the provisions of the Indian Evidence Act for proceeding further in the hearing of the matter. The issues that arise for consideration are decided while disposing of the matter finally considering all the facts and circumstances brought on record. The order of the Court as to the admissibility or inadmissibility of a particular question is therefore the interlocutory order as the issue cannot be said to have been finally set at rest. In view of Sec. 397 (2) of the Code of Criminal Procedure, the Revision is not maintainable.

7. In view of such law, the order in question is interlocutory order and, therefore, next question that arises for consideration is whether it is open to this court to examine the merits of the order under Sec. 482 of the Criminal Procedure Code ? What follows from a conjoint reading of Sec. 397 and 482 of the Criminal Procedure Code is that if the High Court is satisfied that to prevent miscarriage of justice or for securing the ends of justice, grant of relief is necessary, it is not precluded from treating the petition filed u/s. 397 as the petition u/s. 482, Code of Criminal Procedure. Where there is patent or glaring injustice i.e. the order is manifestly illegal, or irregular, or improper, or perverse, or without jurisdiction, or calling for prompt redressal, the powers u/s. 482 can be exercised. If the mandatory requirements are set at naught, the powers can also be exercised. For securing the ends of justice, there is no limitation on the exercise of inherent powers u/s. 482 of Criminal Procedure Code. It may be stated that such exercise or powers must be thrifty and chary, or with restraint, and not ordinarily as a matter of course. I will, therefore, examine the merits of the impugned order, though apparently it appears to be interlocutory.

8. On one ground going to the root of the case, it would not be just and proper to exercise the powers u/s. 482. A decision of the Apex Court may be referred to. It is held in the case of Tanviben Pankajkumar Divetia Vs. State of Gujarat - (1997) 7 S.C.C. 156, that the

Court has to give due weight to the opinion given by the doctor who performed the post mortem, if such other opinions given by other doctors are also brought on record observing as under:-

"We may also indicate here that the doctor who had held the post-mortem examination had occasion to see the injuries of the deceased quite closely. In the absence of any convincing evidence that the doctor holding post-mortem examination had deliberately given a wrong report, his evidence is not liable to be discarded and in our view, in the facts of the case, the opinion of the doctor holding post-mortem examination is to be preferred to the expert opinion of Dr. Shariff."

In the case on hand, Dr. M.S. Makwana (Ex.11) had performed the post mortem, while Dr. Shingala (Ex.16) who performed C.T. Scan in Prabhat Hospital got prepared the report thereof under the signature of Dr. Praful Saxena, and gave his expert opinion. It is not suggested while examining Dr. Makwana further and not shown to me from the materials on record that Dr. Makwana has deliberately given a wrong opinion and 2nd opinion was required to be brought on record. In view of the matter, even if the question was allowed, the prosecution would have gained nothing for whatever may be the opinion of Dr. Shingala, the same being the expert opinion having no prepotency will have to be kept out of consideration in this case. There is therefore no just reason to exercise the powers u/s. 482 of the Code of Criminal Procedure, even if it is assumed for a while that the learned Addl. Sessions Judge was not right in disallowing the question.

9. For the aforesaid reasons, the Revision Application, against the order of the lower court allowing or disallowing to put a question, is not competent. The lower court, in the result, cannot be directed to allow the prosecution to ask the question and record the answer.

10. In view of the matter, this Revision Application, being incompetent in law, is hereby dismissed. Notice discharged.

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